FILE COPY

Supreme Court, U.S.
FILED
MAY 17 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1385

SYDNEY R. NEWMAN,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LEONARD G. BISCO,
Counsel for Petitioner,
29 Broadway,
New York 6, N. Y.

FREDERICK E. WINKLER,
BRUCE MCCLAIN,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Petition for Writ of Certiorari:

Opinions Below 1
Jurisdiction 2
Statement of the Matter Involved..... 2
Statement of Facts..... 2
Question Presented 4
Statutes Involved 4
Specification of Errors to Be Urged..... 4
Reasons Relied on for Allowance of This Writ.. 4
Conclusion 5

Brief in Support of Petition:

Statement 7
Argument 7

The First Ground. The Circuit Court of Appeals, Second Circuit, has decided a Federal question in a way probably in conflict, in principle, with applicable decisions of this Court.. 7

The Second Ground. The Circuit Court of Appeals, Second Circuit, has decided an important question of local law in a way probably in conflict with applicable local decisions..... 23

The Third Ground. The decision of the Circuit Court of Appeals, Second Circuit, is in conflict with a decision of the Circuit Court of Appeals, Sixth Circuit, on the same matter..... 30

Conclusion 37

Appendix 39

TABLE OF CASES CITED:

PAGE

Bingham's Trust v. *Commissioner*, 325 U. S. 365...17, 32
Brooklyn National Corporation v. *Commissioner*, 157 Fed. (2d) 450 (1946, C. C. A.—2) 21, 22

Carrier v. *Carrier*, 226 N. Y. 114 14
Chertoff v. *Commissioner* (C. C. A. 6, No. 10308, decided April 7, 1947) 33, 34, 35, 36
Choate v. *Commissioner*, 324 U. S. 1 (1945) 18
Commissioner v. *Estate of Bedford*, 325 U. S. 283 (1945) 20, 21
Commissioner v. *Estate of Holmes*, 326 U. S. 480; 66 S. Ct. 257 .....9, 10, 22
Commissioner v. *Tower*, 327 U. S. 280 (1946) 18
Cotton v. *Burkelman*, 142 N. Y. 160..... 28
Cushman v. *Commissioner*, 153 Fed. (2d) 510 (1946), 32, 33, 36

Dobson v. *Commissioner*, 320 U. S. 489 (1943), 16, 17, 19, 20, 23, 31, 32, 33, 34

Forman v. *Young*, 166 App. Div. 285 24

Helvering v. *Clifford*, 309 U. S. 331...9, 15, 30, 31, 32, 33, 36

Jergens v. *Commissioner*, 136 Fed. (2d) 497 (1943).. 15
John Kelley Company, The v. *Commissioner*, 326 U. S. 521 (1946) 18, 19, 32
Jones v. *Commissioner*, 152 Fed. (2d) 392 (1945).... 20
Jones v. *Jones*, 124 Ill. 254 .....12, 13

Kinnear v. *Rogers*, 42 N. Y. 531 14
Kirschenbaum v. *Commissioner*, 155 Fed. (2d) 23 (1946) 19, 20

Mallinckrodt v. *Nunan*, 146 Fed. (2d) 1 (1945) 15
Manion v. *Peoples Bank of Johnstown*, 292 N. Y. 317, 25, 26, 27

PAGE

Newman, Lillian M. v. *Commissioner,* 1 T. C. 921..... 14

Osborn v. *Bankers Trust Co.,* 5 N. Y. S. (2d) 211.... 14

Pembroke Realty and Securities Corp. v. *Commissioner,* 122 Fed. (2d) 252..... 21

Richardson v. *Commissioner,* 121 Fed. (2d) 1 (1941), 15, 31, 36

Stafford v. *Washburn,* 208 N. Y. 536 14
Stix v. *Commissioner,* 152 Fed. (2d) 562 (1945)....28, 29
Stuart v. *Commissioner,* 124 Fed. (2d) 772 (C. C. A.—7, 1941), aff'd 317 U. S. 154, 10, 11, 12, 13, 14, 15, 22, 23, 32
Sweeney v. *Warren,* 127 N. Y. 426.....24, 25, 28

Towler v. *Towler,* 142 N. Y. 371 (1894)..... 24

Wentworth, Matter of, 230 N. Y. 176 14

OTHER AUTHORITIES CITED:

Internal Revenue Code, Section 22(a) (26 U. S. C. A. 22(a)) 4, 15, 34, 39

Judicial Code, Section 240(a), as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. 347(a)) 2

Real Property Law of the State of New York (McKinney's Consolidated Laws of New York Annotated, 1945 Edition, Vol. 49, Part 1):
Section 131 .....4, 24, 39
Sections 134 through 138 .....4, 39, 40
Section 149 .....26, 27

Scott on Trusts, Vol. 2, Sec. 185 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .

SYDNEY R. NEWMAN,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals, Second Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Sydney R. Newman, respectfully shows to this Court as follows:

This is a petition for a writ of certiorari to the Circuit Court of Appeals, Second Circuit, to review the decision of that Court which reversed the decision in favor of your petitioner by the Tax Court of the United States.

OPINIONS BELOW.

The opinion of the Tax Court of the United States is reported in 5 T. C. 603. The opinion of the Circuit Court of Appeals, Second Circuit, is reported in 159 F. (2d) 848.

Jurisdiction.

The order for mandate of the Circuit Court of Appeals, Second Circuit, was entered February 20, 1947. The case arose under the Internal Revenue laws. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. 347 (a)).

Statement of the Matter Involved.

The petitioner, the taxpayer, on February 3, 1944, duly filed his petition with the Tax Court of the United States (R. 25), in respect of a deficiency of $493.02 in his income tax for the calendar year 1940. A decision was entered by the Tax Court in favor of the petitioner on September 28, 1945 (R. 26 and 36). Petition for review was filed with the Circuit Court of Appeals, Second Circuit, on December 14, 1945 (R. 26). Pursuant to the mandate of said Circuit Court, an order was entered on February 20, 1947, reversing the decision of the Tax Court (R. 49) and remanding the cause for further proceedings in accordance with the opinion of the Circuit Court.

The deficiency arose from the action of the Commissioner of Internal Revenue in adding to the petitioner's gross income for the calendar year 1940 the sum of $830., representing the aggregate net incomes, for said calendar year, of two *inter vivos* trusts created by the petitioner's wife, Lillian M. Newman.

Statement of Facts.

All of the relevant facts are as set forth in the findings of fact and opinion of the Tax Court (R. 26-32). Such facts may be briefly summarized as follows.

Under date of June 28, 1940, the petitioner's wife,

Lillian M. Newman, created two *inter vivos* trusts (R. 36-41), one for the benefit of her daughter, Janice R. Newman, and the other for the benefit of her son, Robert W. Newman, both of whom were infants at that time. The petitioner was appointed as sole trustee of each trust and, aside from the names of the beneficiaries, the provisions of the two trust instruments were identical.

Under each instrument, the trustee was authorized to invest and reinvest the trust fund in such securities as he might deem best, and was directed to pay the net income to the designated child of the grantor during the lifetime of such child. Upon the death of such child, the trust fund was to be distributed to the petitioner. If the petitioner should not then be living, the trust fund was to be distributed to such person or persons as he might have appointed by will, or, in default of such appointment, to his distributees.

Each instrument also contained the following clause (R. 39):

> "TENTH: Said Sydney R. Newman shall have the power at any time during his life, by an instrument in writing delivered to the Trustee, to revoke this agreement, in whole or in part, or to alter or amend the same or to free any of the property held in trust from the terms of this trust, and upon receipt of such instrument in writing, the Trustee shall turn over to the Grantor any funds or property held by the Trustee hereunder as required by said written notice, and the receipt of the Grantor for such property shall be a full acquittance to the Trustee."

The petitioner contends that the aggregate net incomes of the above mentioned trusts, for the calendar year 1940, did not constitute income taxable to the petitioner in his individual capacity. The Tax Court agreed with the petitioner. By a two to one decision, the Circuit Court of

Appeals, Second Circuit, disagreed, Judge Learned Hand dissenting.

Question Presented.

Did the sum of $830., representing the aggregate net incomes, for the calendar year 1940, of two *inter vivos* trusts created by the petitioner's wife, Lillian M. Newman, constitute income taxable to the petitioner?

Statutes Involved.

The statutes involved are Section 22 (a) of the Internal Revenue Code (26 U. S. C. A. 22 (a)), and Sections 131 and 134 through 138 of the Real Property Law of the State of New York. The relevant portions of such statutes are set forth in the Appendix at pages 39 and 40.

Specification of Errors to Be Urged.

The Circuit Court of Appeals, Second Circuit, erred:

(1) In holding that the sum of $830., representing the aggregate net incomes, for the calendar year 1940, of two *inter vivos* trusts created by the petitioner's wife, Lillian M. Newman, constituted income taxable to the petitioner in his individual capacity.

(2) In reversing the decision of the Tax Court of the United States.

Reasons Relied On for Allowance of This Writ.

(1) The Circuit Court of Appeals, Second Circuit, has decided a Federal question in a way probably in conflict, in principle, with applicable decisions of this Court.

(2) The Circuit Court of Appeals, Second Circuit, has decided an important question of local law in a way probably in conflict with applicable local decisions.

(3) The Circuit Court of Appeals, Second Circuit, has rendered a decision in conflict with a decision of the Circuit Court of Appeals, Sixth Circuit, on the same matter.

Conclusion.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of, this Court, directed to the United States Circuit Court of Appeals, Second Circuit, to the end that this case may be reviewed and determined by this Court; that the decision and order for mandate of the Circuit Court of Appeals, Second Circuit, be reversed; and that your petitioner be granted such other and further relief as the ends of justice may require.

Respectfully submitted,

SYDNEY R. NEWMAN,
By: Leonard G. Bisco,
Attorney for Petitioner,
29 Broadway,
New York 6, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .

SYDNEY R. NEWMAN,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Statement.

The statement of the matter involved, the statement of facts, the question presented, and the statutes involved are as set forth in the petition.

ARGUMENT.

THE FIRST GROUND.

The Circuit Court of Appeals, Second Circuit, has decided a Federal question in a way probably in conflict, in principle, with applicable decisions of this Court.

The decision of the Circuit Court in the case at bar is based chiefly upon its construction of the intention of the

petitioner's wife, Lillian M. Newman, who was the grantor of the *inter vivos* trusts in question, as expressed in the following clause contained in each of the two trust instruments (R. 39):

> "TENTH: Said Sydney R. Newman shall have the power at any time during his life, by an instrument in writing delivered to the Trustee, to revoke this agreement, in whole or in part, or to alter or amend the same or to free any of the property held in trust from the terms of this trust, and upon receipt of such instrument in writing, the Trustee shall turn over to the Grantor any funds or property held by the Trustee hereunder as required by said written notice, and the receipt of the Grantor for such property shall be a full acquittance to the Trustee."

The Tax Court held that the power granted to the petitioner to alter or amend each trust instrument did not confer upon him the right to receive for his own benefit either the income or principal of the trust during the lifetime of the child of the grantor and of the petitioner for whose benefit such trust was established (R. 31). It was held to be unnecessary to consider whether the petitioner possessed such power in his individual capacity, or as trustee, because in neither event could the language quoted above be reasonably interpreted in such manner as to entitle the petitioner to destroy the life interests of the primary beneficiaries by means of conveying or otherwise diverting to himself the beneficial interest in the principal or income (R. 32).

The Tax Court then ruled that, without such power the petitioner could not "be considered as so completely in economic control of the trust as to be taxed upon its income", under any case cited by the Commissioner or known to the Tax Court; and that to so hold, in the case of a person other than the grantor of the trust, "would be to broaden unjustifiably" the doctrine established by

this Court in *Helvering* v. *Clifford*, 309 U. S. 331 (R. 32). It was accordingly held that the trust income was not taxable to the petitioner (R. 32).

The Circuit Court pointed out that, under the above quoted clause of the trust instruments, the petitioner's power to revoke, alter or amend the trusts, and to free the property from its terms, was granted to the petitioner by name (R. 43). The Circuit Court then stated that no inference that such powers were granted in trust may be drawn from the fact that the petitioner was also named as trustee, and held that:

> "Since these powers alone were given to him by name, we must conclude that he was to enjoy them without restriction, regardless of who was trustee. *Commissioner of Internal Revenue* v. *Estate of Holmes*, 326 U. S. 480, 489, 490; 66 S. Ct. 257" (R. 44-45).

In reliance upon this conclusion, the Circuit Court held that the petitioner was entitled to exercise such powers for his own benefit (R. 44); and that he was taxable upon the trust income, on the ground that he possessed the power to use the trust fund as he saw fit (R. 46).

It will be noted that the Circuit Court based its decision upon the opinion of this Court in *Commissioner* v. *Estate of Holmes* (R. 44-45). It is respectfully submitted that the *Holmes* case does not support the decision of the Circuit Court in the case at bar.

Commissioner v. *Estate of Holmes* was an estate tax case in which the taxpayer was both grantor and sole trustee of a trust. The grantor had reserved the right to terminate the trust and to accelerate the distribution of the principal to the designated beneficiaries, but had reserved no right to revest the principal in himself. In

discussing certain language contained in the trust instrument, this Court merely said:

> "As we have noted the eleventh paragraph is not wholly clear concerning the premise. But in terms the reservation is to 'the grantor, during his lifetime' and grammatical construction of the second sentence *seems to indicate* the qualifying clause 'while acting as trustee hereunder' was intended to apply only to decedent's son or sons acting in that capacity. If the question has been saved, *we cannot say upon this language* that the grantor did not reserve the power of termination to himself as donor rather than merely as trustee." (Italics supplied.)

It will be observed that the foregoing is no more than a statement by this Court that, in construing the ambiguous language of a particular trust instrument, this Court was not *convinced* that the grantor did not reserve the power of termination in his individual capacity. It is respectfully submitted that such statement cannot properly be considered as establishing a rule of law of general application to the effect that, when powers are given to a trustee by name, they are *necessarily* to be regarded as having been given to him to be exercised for his personal benefit as an individual, and not in his fiduciary capacity for the benefit of the trust beneficiaries.

It is therefore respectfully submitted that the Circuit Court has misconstrued the intent and effect of this Court's decision in the *Holmes* case; and that, since the Circuit Court's decision in the case at bar was based primarily upon such misconstruction, such decision is therefore in conflict, in principle, with the decision of this Court in the *Holmes* case.

Stuart v. *Commissioner*, 124 Fed. (2d) 772 (C. C. A.—7, 1941), aff'd 317 U. S. 154, involved a factual situation

very similar to that in the case at bar. In the *Stuart* case, the trust instrument gave the trustees the following powers:

> "to alter, change or amend this Indenture at any time and from time to time, by changing the beneficiary hereunder, or by changing the time when the Trust Fund, or any part thereof, or the income is to be distributed, or by changing the Trustees, *or in any other respect.*" (Italics supplied.)

The Circuit Court of Appeals, Seventh Circuit, concluded that the trustees had no authority under the laws of Illinois to revest the property in the grantor. It was held that the donee of any such power must exercise it in his fiduciary capacity, as trustee, and only in the interests of the life beneficiaries, whose interests were the primary concern of the grantor. The opinion of the Circuit Court contained the following statements, commencing at page 777:

> "A court of equity has power to control the administration of a trust so that it will accord with the purposes of the grantor. A discretion lodged in a trustee is rarely, if ever, to be regarded as a permit to act arbitrarily. Such discretion should be confined to the exercise of judgment not unreasonable in the light of the purposes of the trust and of the circumstances in which it is sought to be exercised. The power of the Court exists solely for the protection of the right of the grantor and the beneficiaries (see *Rollins* v. *Helvering*, 92 Fed. 2d 390), and the laws of Illinois in this respect are applicable to this case. It was conceded in argument by the Commissioner that under the Illinois law the wife and brother as trustees would have no right to substitute themselves, or either of them, as beneficiaries, yet he insists that they would have the right to substitute

their co-trustee, the grantor, as the sole beneficiary * * *.

"However, we are convinced that the wife and brother, as trustees, had no authority under the Illinois law to revest the property in the grantor. This would be to give them power, not only to destroy the trust but to dissipate the proceeds contrary to the purposes set forth in the declaration, and it would also furnish an opportunity by secret agreement for subsequent distribution among the trustees. Such a door should not be left open. Congress and the courts, theoretically at least, have always regarded the preservation of trust funds as a sacred obligation, and they have always and everywhere proceeded on the theory that a trust officer (*sic.*) should not be permitted to be placed in any position where he may be 'tempted above that which he is able.'

"Where great discretion is vested in a trustee, its exercise is subject to the control of a court of chancery. *Maguire* v. *City of Macomb,* 293 Ill. 441. A very broad discretion conferred upon a trustee in the selection of beneficiaries does not constitute an unlimited discretion which the Court cannot control. *Welch* v. *Caldwell,* 226 Ill. 488."

The Circuit Court then cited *Jones* v. *Jones,* 124 Ill. 254, in which the trustees were "invested with a large discretion as to the manner in which they shall execute the trust". The Circuit Court said:

"Their discretion, as trustees of this fund, is subject to the control of the courts of equity, and cannot be arbitrarily exercised so as to deprive the beneficiaries of all benefit of the fund. See also *Frank* v. *Frank* (305 Ill. 181). *The same principle seems to prevail in all jurisdictions both state and federal.* See *Restatement of Law of Trusts,* Sec. 170; *Scott on Trusts,* Vol. 2, Sec. 187; *Lovett* v. *Farnham* (169

Mass. 1); *Fleischmann* v. *Comm.* (40 B. T. A. 672, acquiesced); *Downs* v. *Comm.* (36 B. T. A. 1129)." (Italics supplied.)

In affirming the Circuit Court's opinion, this Court in *Helvering* v. *Stuart*, 317 U. S. 154 (1942), stated:

"This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. * * * Without a definite conviction of error in the conclusion, this Court will not reverse that judgment * * *.

"One cannot say that it would be an arbitrary or unreasonable or even an unlikely holding on the part of the courts of Illinois to conclude that under the terms of these trusts, equity ought to and would prevent the wife and brother of the donor, claiming authority under the provisions of paragraph nine of the indenture, from vesting the property in themselves or in the donor or in others for the benefit of themselves or the donor, to the detriment of the present beneficiaries * * *.

"It also seems that in Illinois a general power of appointment is exercisable in favor of the donee or his creditors * * *. But evidently the Court of Appeals does not consider that these trustees under Illinois law have the power to vest this property in themselves. Such a result follows from their view that the property could not be vested in the grantors. *Consequently, this power of the trustees is not a general power but a power in trust exercisable as fiduciaries to carry out the purposes of the trust.* * * * These trusts, therefore, stand as though an Illinois statute or a provision of the instruments forbade assignments of any of the corpora or of the income to the grantors except as may be specifically provided by their terms." (Italics supplied.)

As will be noted, the trustees' right to alter or amend the trust instrument in the *Stuart* case was expressed in the broadest of terms and with no qualifications. Moreover the Circuit Court stated that the principles of Illinois law, concerning the nature and effects of such rights, seemed to prevail in all jurisdictions both state and federal. Furthermore, the Tax Court, in the case of *Lillian M. Newman* v. *Commissioner,* 1 T. C. 921, which involved the same trust instruments as in the case at bar, held specifically that these principles of Illinois law prevail in New York, citing *Scott on Trusts,* Vol. 2, Sec. 185; *Osborn* v. *Bankers Trust Co.,* 5 N. Y. S. (2d) 211; *Carrier* v. *Carrier,* 226 N. Y. 114; *Kinnear* v. *Rogers,* 42 N. Y. 531; *Stafford* v. *Washburn,* 208 N. Y. 536; and *Matter of Wentworth,* 230 N. Y. 176.

The petitioner therefore contends that powers given to trustees under trust instruments governed by the laws of such jurisdictions as Illinois and New York are not general powers, but are powers in trust which are exercisable by the trustees to carry out the purposes of the trust; and that this Court's decision in the *Stuart* case constitutes a binding precedent concerning the interpretation to be given, for income tax purposes, to powers granted in such trust instruments.

In its decision in the case at bar, the prevailing majority of the Circuit Court failed to refer to, or to be guided by, this Court's decision in the *Stuart* case. On the contrary, the Circuit Court's decision was based upon an interpretation of the powers granted by the trust instruments involved which was the exact opposite of the interpretation by this Court of the powers granted by the trust instrument in the *Stuart* case, despite the fact that, in both cases, such powers were granted in language of similar import and that, in both cases, the interpretation of the trust instruments was governed by similar laws.

It is therefore respectfully submitted that the decision

of the Circuit Court in the case at bar conflicts, in principle, with the decision of this Court in the *Stuart* case.

In the case at bar, the Tax Court ruled that the only question at issue was whether the petitioner, who was not the grantor of the trusts involved, possessed "such dominion over the income and the trust estate as to be deemed the real owner thereof" (R. 30). In such event, said the Tax Court, the income would be taxable to the petitioner under the provisions of Section 22 (a) of the Internal Revenue Code, as construed by this Court in *Helvering* v. *Clifford*, 309 U. S. 331 (R. 30).

The opinion stated (R. 30) that the Commissioner's contention that the *Clifford* doctrine may be applied to tax trust income to a person other than the grantor of the trust was based largely upon the following cases: *Richardson* v. *Commissioner*, 121 Fed. (2d) 1 (1941); *Jergens* v. *Commissioner*, 136 Fed. (2d) 497 (1943); *Mallinckrodt* v. *Nunan*, 146 Fed. (2d) 1 (1945). The Tax Court then pointed out that, in each of such cases, the taxpayer had the right to use the trust income, or principal, or both, for his personal benefit (R. 31).

The present case was distinguished by the Tax Court from all of such cases, because the petitioner, although he could alter, amend or revoke the trusts, had no power to exercise such rights for his own benefit (R. 31). It was held that the petitioner could not, "under any reasonable interpretation" of the trust instrument, "dispose of the trust corpus to himself during the life of the primary beneficiary", whose right to the income during such period "is the first concern of the grantor". It was accordingly held by the Tax Court that, "without that power", the petitioner "may not, under any case cited or of which we know, be considered so completely in economic control of the trust as to be taxed upon its income". It was further held that to impose the tax, in such a case, upon a

person who was not the grantor of the trusts, "would be to broaden unjustifiably the concept embodied in *Helvering* v. *Clifford*" (R. 32).

The Circuit Court ruled that the basic question was whether the petitioner possessed the right to appropriate the principal or income of the trusts to himself; and that this, in turn, depended upon the intention of the grantor as expressed in the trust instruments (R. 44). It was further ruled that the trust instruments must be construed according to the law of the State of New York, because they were executed in that State and specifically provided that they should be governed by its laws (R. 44). These rulings are in accordance with the contention of the petitioner and with the decision of the Tax Court (R. 30).

Nevertheless, despite the conclusion of the Tax Court to the effect that the trust instruments could not reasonably be interpreted in such manner (R. 32), the Circuit Court held that the petitioner was entitled to exercise his right to alter, amend or revoke the trust instruments as an individual and for his personal benefit, rather than as trustee and in his fiduciary capacity for the benefit of the primary beneficiaries (R. 45-46). The only reason assigned by the Circuit Court for this conclusion was that, in the language giving the petitioner the power to alter, amend or revoke the trust instruments, he was referred to by name, instead of as trustee (R. 44-45). In view of this conclusion, the Circuit Court decided that the trust income was taxable to the petitioner and reversed the decision of the Tax Court (R. 46).

In *Dobson* v. *Commissioner*, 320 U. S. 489 (1943), this Court emphasized the finality of decision of the Tax Court. The opinion set forth the reasons which make such finality desirable and in accordance with Congressional intent in establishing the Tax Court as an administrative body. In subsequent cases, this Court has further defined and explained the rules to be applied by the Circuit Courts

in the review of Tax Court decisions. It is contended by the petitioner that such decisions of this Court indicate that the case at bar is one in which the decision of the Tax Court should have been affirmed by the Circuit Court under the rule of the *Dobson* case.

The concurring opinion of Mr. Justice Frankfurter in *Bingham's Trust* v. *Commissioner*, 325 U. S. 365, decided June 4, 1945, makes it clear that, while a question of interpretation is historically considered as a question of law, it is distinctly a matter within the province of the Tax Court. The concurring opinion contains the following statements on page 380:

> "Thus, the construction of documents has for historic reasons been deemed to be a question of law in the sense that the meaning is to be given by judges and not by laymen, but this crude division between what is 'law' and what is 'fact' is not relevant to the proper demarcation of functions as between the Tax Court and the reviewing courts.
>
> • • • •
>
> "The specialized equipment of the Tax Court and the trained instinct that comes from its experience ought to leave with the Tax Court the final say also as to matters which involve construction of legal documents and the application of legislation even though the process may be expressed in general propositions, so long as the Tax Court has not committed what was characterized in the *Dobson* case as a 'clear-cut mistake of law'."

A determination of the question at issue in the present case involves (1) An interpretation of the trust instruments; (2) A question of law, the answer to which is not clear-cut; and (3) A question of law which is not one of general application, but which is dependent upon the circumstances of the particular case. It is respectfully

submitted that, where the question for decision in a tax case involves such factors, the determination of the Tax Court should be regarded as final.

The petitioner contends, and the Circuit Court conceded, that the petitioner's right to alter, amend, or revoke the trust instruments for his own benefit is a question of interpretation of the grantor's intention, as expressed in the trust instruments, and that such interpretation is to be determined by the laws of New York (R. 44). Thus there is involved not only a question of law but also the intent of the grantor.

In two recent decisions, this Court has held that questions of intent are for final determination by the Tax Court. In *Choate* v. *Commissioner*, 324 U. S. 1, decided January 29, 1945, the question was whether the parties intended a cash sale of equipment. The opinion of the Court contained the following statement:

> "In the second place, the Tax Court found that the parties intended a cash sale of the equipment. That question is argued here as if it were open for redetermination by us. It is not. It is the kind of issue reserved for the Tax Court under *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. 489, 88 L. ed. 248, 64 S. Ct. 239, and *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, 167, 168, 86 L. ed. 1352, 1354, 1355, 62 S. Ct. 984."

In *Commissioner* v. *Tower*, 327 U. S. 280, decided February 25, 1946, the question was whether the taxpayer and his wife intended to carry on business as a partnership. This Court held that the Tax Court's determination upon this point was binding on the question of intent.

This Court has recently held that a decision of the Tax Court is to be considered as final, unless such decision is based upon a "clear-cut" question of law. In *The John Kelley Company* v. *Commissioner*, 326 U. S.

521, decided January 7, 1946, this phase of the *Dobson* rule was stressed as follows:

> "It is only recently that we gave careful consideration to the problems of review of Tax Court decisions. *Dobson* v. *Commissioner of Internal Revenue,* 320 U. S. 489, 88 L. ed. 248, 64 S. Ct. 239. That opinion emphasized that our interpretation of Congressional purpose, in enacting the statute just quoted for judicial review of Tax Court decisions, was that *Congress intended to leave to the final determination of the Tax Court all issues which were not clear-cut questions of law.*" (Italics supplied.)

In *Kirschenbaum* v. *Commissioner,* 155 Fed. (2d) 23, decided April 8, 1946, the Circuit Court of Appeals, Second Circuit, pointed out that, under the *Dobson* doctrine, as enunciated by this Court, a decision of the Tax Court may not be reversed, unless it is based upon "a plainly erroneous legal proposition". The decision of the Circuit Court in the *Kirschenbaum* case reads, in part, as follows:

> "In cases where it affirmatively appears that the Tax Court has made a plainly erroneous legal proposition the basis of its decision, we will assume *arguendo* that a question does emerge with adequate certainty to be reviewable by us, although we are not sure, for at times it has seemed that, in addition, the erroneous legal proposition must be one of general application. Be that as it may, *Commissioner* v. *Estate of Bedford, supra* (325 U. S. 283) held non-justiciable a question almost the same as that before us, although it concerned a payment made upon a 'reorganization' under Sec. 112 (g) (1) (D) and (E) of the Act of 1936, and not upon a 'cancellation or redemption' under Sec. 115 (g) * * *. We can see no difference between that situation and the one before us, so far as concerns the finality

> of the Tax Court's decision * * *. When, therefore, Frankfurter, *J.*, said on page 292 of his opinion in *Commissioner* v. *Estate of Bedford, supra,* that the court's doubts 'would have to be stronger than they are to displace the informed views of the Tax Court', equal doubts in the case at bar should pursuade us not to do the same * * *. For these reasons we think that a plainly erroneous legal proposition does not emerge from the record, and that the orders must stand * * *. As a preliminary to deciding whether the shares were 'redeemed', we must decide, even though *Alpers* v. *Commissioner, supra* (126 Fed. 2d 58) be law, that the point is not too enmeshed with the facts to be considered; if it is not, that it is plainly enough wrong for us to overrule the Tax Court; and, perhaps, that it is a legal proposition of general application. We hold that the question is not plainly enough wrong to allow us to displace the decision of the Tax Court."

The Circuit Court of Appeals, Ninth Circuit, has also recognized that a Tax Court decision may not be reversed, unless it is based upon "a clear cut mistake of law". This is demonstrated by the following excerpt from the Circuit Court's decision in *Jones* v. *Commissioner,* 152 Fed. (2d) 392, decided December 15, 1945:

> "The Tax Court so found and, in that decision we are unable to identify a clear cut mistake of law and, hence, the decision of the Tax Court must stand."

The case at bar, furthermore, comes within the doctrine of the *Dobson* case, in that it must be determined in the light of its own particular circumstances, and does not depend upon a generalizing principle. In *Commissioner* v. *Estate of Bedford,* 325 U. S. 283, decided May 21, 1945, the question was whether a certain distribution had the effect of a taxable dividend. This Court pointed

out that the question was not free from doubt, but that the doubts must be strong to displace the conclusion of the Tax Court.

> "Treating the matter as a problem of statutory construction for our independent judgment, we hold that a distribution, pursuant to a reorganization, of earnings and profits 'has the effect of a distribution of a taxable dividend' within §112 (c) (2). As is true of other teasing questions of construction raised by technical provisions of Revenue Acts the matter is not wholly free from doubt. But these doubts would have to be stronger than they are to displace the informed views of the Tax Court. And if the case can be reduced to its own particular circumstances rather than turn on a generalizing principle we should feel bound to apply *Dobson* v. *Commissioner*, 320 U. S. 489, and sustain the Tax Court. Reversed."

The extremely limited class of decisions of the Tax Court which may be reviewed by the Circuit Courts is emphasized in the recent decision of the Second Circuit in *Brooklyn National Corporation* v. *Commissioner*, 157 Fed. (2d) 450, decided July 2, 1946. In that case, the Tax Court had declined to follow the decision of the Second Circuit upon the same question in *Pembroke Realty and Securities Corp.* v. *Commissioner*, 122 Fed. (2d) 252. The Circuit Court, in the *Brooklyn National Corporation* case, concluded that it was bound by the Tax Court's decision, despite the fact that the Circuit Court believed the decision to be incorrect in law and would have reversed it had it come before the Circuit Court on appeal from a United States District Court. Judge Learned Hand's opinion in the *Brooklyn National Corporation* case contained the following statements:

> "• • • But the Supreme Court has repeatedly admonished us (in so many decisions that it would be idle

to repeat them), that our power to review a ruling of the Tax Court is very much more limited than in the case of a district court. As we understand it, before we may substitute our own interpretation of a provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; but *we must conclude that the Tax Court has been indubitably wrong* in its decision of the question which emerges; reasonable differences in legal opinion we are to resolve in its favor. We have recently discussed the matter in *Kirschenbaum* v. *Commissioner*, 155 F. (2d) 23, and have now nothing to add to what we said. It seems to us that the right answer to whether §115(c) is controlling here is not so certain that we should be justified in following our own beliefs; and therefore, although personally we are of the same mind as before, we think that we should yield to the insistence of the Tax Court, which within these limits is really the court of last appeal. One question remains. It may be asked why the same reasoning did not apply, when in *Pembroke Realty and Securities Corp.* v. *Commissioner, supra*, we reversed the holding of the Board of Tax Appeals. It did; but in August, 1941, the Supreme Court had not yet made clear, as it now has, how straitly our jurisdiction is confined. Our decision was then wrong, not indeed because as an original question it was, but because, by assuming jurisdiction to consider the question at all, we invaded the prerogative of the Tax Court and disregarded the finality of its orders. That finality depends, as we understand, upon the added competency which inevitably follows from concentration in a special field." (Italics supplied.)

In view of the decisions of this Court in *Commissioner* v. *Estate of Holmes*, 326 U. S. 480, and *Stuart* v. *Commis-*

sioner, 317 U. S. 154, it is contended that the Tax Court's decision in favor of the petitioner was correct in law. In any event, such decision cannot be said to have been based upon "a plainly erroneous legal proposition", or to represent "a clear cut mistake of law".

Accordingly the petitioner contends that, under the rule established by this Court in *Dobson* v. *Commissioner*, 320 U. S. 489, as further defined and explained in the subsequent decisions of this Court referred to above, the Circuit Court erred in reversing the decision of the Tax Court in the case at bar. It is therefore respectfully submitted that, in the present case, the Circuit Court has decided a Federal question in a manner which is in conflict, in principle, with the decisions of this Court cited above.

THE SECOND GROUND.

The Circuit Court of Appeals, Second Circuit, has decided an important question of local law in a way probably in conflict with applicable local decisions.

The trust instruments in the case at bar were executed in, and specifically provided that they should be governed by, the laws of New York State (R. 40-41). As previously pointed out, it is contended by the petitioner that the construction of such trust instruments is to be determined in accordance with the laws of that State, and the Circuit Court so held (R. 44). It is therefore clear that the Circuit Court decided a question of local law.

It is further contended by the petitioner that, under the law of New York State, the question whether the right granted to the petitioner to alter or amend the trust instruments entitled the petitioner to appropriate the principal or income of the trusts to his personal benefit depends upon the intent of the grantor. That the language of a power is to be construed according to the intent of

the grantor is an established principle of New York Law. In *Towler* v. *Towler*, 142 N. Y. 371 (1894), the Court of Appeals of New York considered a right reserved by the grantor of a deed to grant or devise a life estate to a third party. The Court said:

> "An instrument creating a power, like all other instruments, must receive a reasonable construction, and the intention of the party executing the instrument is to be ascertained from the language used, the situation of the parties, and all surrounding circumstances. * * * The words of a power of this character are not always confined to what they necessarily import in their strictest legal sense, but they are to be construed according to the intention of the party using them. (*Wilson* v. *Troup*, 2 Cow. 196)."

The petitioner contends that, if the power granted to him by paragraph Tenth of the trust instruments in question was a "power" at all, within the meaning of Section 131 of the Real Property Law of New York (see appendix, *infra*), it was a power in trust, which could be exercised only in favor of the minor life beneficiaries of the trust, and not a beneficial power which could be exercised by the petitioner in favor of himself, his estate or his creditors. Under New York law, if a power is given to a trustee or executor as such, the power is, of course, in trust, if there is no other evidence that the power was intended to be beneficial. (*Sweeney* v. *Warren*, 127 N. Y. 426, 434; *Forman* v. *Young*, 166 App. Div. 285, 290.)

The opinion of the Court of Appeals in the *Sweeney* case contains the following statements:

> "Undoubtedly a power may be vested in executors, as such, to be exercised for their own benefit as individuals, which would be a beneficial one; but *when a power is conferred upon executors by virtue of their office, and not on them as individuals, there*

> *being no other evidence that it was intended to be beneficial to them, the presumption is that it was given for the purpose of being executed in the interest of the estate, and not for their own benefit.* In this case the power sought to be conferred by this clause runs to the executors in their respective (*sic*) capacity and not to them as individuals and it is clear that the testator did not intend to confer a power on his executors for their personal benefit * * *." (Italics supplied.)

The *Sweeney* case is a decision by the highest Court of New York State to the effect that there is a presumption that a power given to a fiduciary, as in the case at bar, is for the benefit of the trust and not for his personal benefit as an individual.

In its opinion, the Circuit Court stated that a power is exercisable for the donee's own benefit and no intent to restrict it will be inferred from the fact that the grantee is given fiduciary duties, provided the power was given to him as an individual and not in trust (R. 44). As authority for this statement, the Circuit Court cited *Manion* v. *Peoples Bank of Johnstown*, 292 N. Y. 317 (R. 44).

In that case, testatrix devised real property to her son by name for life "with the absolute power of disposition". Various alternative dispositions of the property were provided for upon the son's death. The Court of Appeals of New York held that the son was given a general power; that such power was not a power in trust within the meaning of Real Property Law, Section 137, because there was no one other than the grantee entitled to any benefit therefrom; and that no contradictory intent was shown by the son's appointment as executor. The Court said:

> "The will made no designation of any person other than Michael Manion as entitled to any benefit from

> the general power thereby granted to him; and, since the grant thereof ran to him individually, no contradictory intent was shown by the fact of his appointment by the testatrix as her sole executor. (Cf. *Sweeney, et al.* v. *Warren,* 127 N. Y. 426, 434; *Cotton* v. *Burkelman,* 142 N. Y. 160, 163, 164.) In a word, the present power was not a power in trust."

In the *Manion* case, the will provided that, if the donee should die leaving a widow but no descendants, the title would pass to another son of testatrix in fee simple. The donee and his wife mortgaged the property to a bank. The donee died leaving a widow but no descendants and was survived by plaintiff, who was the other son of testatrix.

Special Term and the Appellate Division both held that, "It was clearly not the intention of testatrix to give Michael a beneficial power of sale. Therefore the power in question was a general but not a beneficial power; and not being a beneficial power was a power in trust." (*Manion* v. *Peoples Bank of Johnstown, supra,* at p. 320.)

The Court of Appeals reversed but the crucial question is the ground for its reversal. It will be noted that the will gave the donee a life estate "with the absolute power of disposition". The Court of Appeals held that the quoted phrase "presumably was patterned after Section 149 of the Real Property Law, so as to bring about the result dictated by that Section". The section in question provides as follows:

> "Where an absolute power of disposition, *not accompanied by a trust,* is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts." (Italics supplied.)

The case at bar is clearly distinguishable upon its facts from the *Manion* case. In the latter case, the donee of the power was given a legal life estate without the creation of any trust, together with "the absolute power of disposition" of the property; and the gift was made to the grantee in his individual capacity. In the present case, the property was transferred in trust to the petitioner, as trustee. The petitioner was given no beneficial interest in the income from the property, and the trust instruments contained no language granting to him any power of disposition of the property, other than the right to revoke the trusts, in which event he was required to turn over to the grantor any funds or property with respect to which the trusts had been so revoked.

Since the petitioner's right to revoke the trusts in the present case, as well as his right to alter or amend the trust instruments, is "accompanied by a trust", such right, therefore, does not constitute an "absolute power of disposition", as defined in Real Property Law, Section 149. Accordingly the *Manion* case affords no support for the Circuit Court's decision in the present case.

The opinion of the Circuit Court in the case at bar states that, since the powers granted to the petitioner by paragraph Tenth of the trust instruments were given to him by name, "we must conclude that he was to enjoy them without restriction, regardless of who was trustee" (R. 44-45). Since the Circuit Court ruled that the petitioner possessed such powers individually, and not in trust, it was held that he was entitled to exercise them in whatever manner he saw fit, subject to the limitations contained in the trust instruments (R. 45).

The trust instruments in question created express trusts, of which the petitioner was appointed as sole trustee (R. 36). The instruments contained no language indicating that the grantor intended that the rights given to the petitioner could be exercised by him for his own benefit. Moreover there is no such evidence from any other

source. It is therefore obvious that all rights with respect to the principal and income of the trust estate were granted to the petitioner in his fiduciary capacity and were to be exercised by him as trustee. As previously pointed out, the Court of Appeals of New York has expressly held that a power conferred upon a person acting in a fiduciary capacity is *presumed* to be granted for the purpose of being exercised in the interest of the trust estate and not for the benefit of the fiduciary. (*Sweeney* v. *Warren*, 127 N. Y. 426; *Cotton* v. *Burkelman*, 142 N. Y. 160.)

In *Sweeney* v. *Warren* (*supra*), the Court of Appeals of New York held that a power is in trust, if the person or class of persons to be benefited is *either* designated in *or* is "clearly ascertainable from the instrument by which the power is created". This point is expressly recognized in the opinion of the Circuit Court (R. 44). In the present case, the minor life beneficiaries are specifically designated in the trust instruments as the persons whose interests were the chief concern of the grantor. Moreover, since the trusts were created for their primary benefit, it is clear that all rights conferred upon the trustee were designed for the protection of their interests. They are therefore "persons clearly ascertainable from the instrument" by which the right to alter or amend was granted. Accordingly, if the taxpayer's right to alter or amend was a "power" at all, it was not a beneficial power, but on the contrary, a power in trust which could be exercised only in the interests of the beneficiaries.

In the case of *Stix* v. *Commissioner*, 152 Fed. (2d) 562, decided December 21, 1945, the Circuit Court of Appeals, Second Circuit, expressly upheld the contention of the petitioner that discretionary powers granted to a trustee, regardless of how unqualified and all-embracing may be the language by which they are granted, may not be exercised by the trustee for his own benefit at the expense of the beneficiaries. In that decision, Judge Learned Hand,

who wrote the dissenting opinion of the same Court in the case at bar, stated:

> "Nevertheless, we agree that *no language, however strong, will entirely remove any power held in trust from the reach of a court of equity.* After allowance has been made for every possible factor which could rationally enter into the trustee's decision, if it appears that he has utterly disregarded the interests of the beneficiary, the court will intervene. Indeed, were that not true, the power would not be held in trust at all; the language would be no more than a precatory admonition. *Collister* v. *Fassitt,* 163 N. Y. 281; *In re Van Zandt's Will,* 231 App. Div. 381; *Commissioner* v. *Dravo,* 3rd Cir., 119 F. 2nd 97; *Phipps* v. *Commissioner,* 2nd Cir., 137 F. 2nd 141; Restatement of Trusts, § 187, Comment K; § 125." (Italics supplied.)

Accordingly the petitioner contends that under the applicable provisions of the Real Property Law of New York, as construed by the Court of Appeals, the highest court of that State, the petitioner's right to alter or amend the trust instruments in the case at bar could not be exercised by him as an individual and for his own economic benefit, but only as trustee and for the benefit of the minor beneficiaries of the trusts. It is therefore respectfully submitted that, in deciding to the contrary and in holding that the trust income in question was taxable to the petitioner, the Circuit Court has decided an important question of local law in a way probably in conflict with the applicable local decisions cited above.

THE THIRD GROUND.

The decision of the Circuit Court of Appeals, Second Circuit, is in conflict with a decision of the Circuit Court of Appeals, Sixth Circuit, on the same matter.

In the case at bar, the Tax Court held that the only question at issue was whether the petitioner possessed such a degree of control over the income and principal of the trusts as to render the trust income taxable to him under the doctrine established by this Court in *Helvering* v. *Clifford* (*supra*). The Tax Court said (R. 30):

> "*The only question* is whether petitioner has such dominion over the income and the trust estate as to be deemed the real owner thereof, in which event the income would be taxable to him under the provisions of section 22 (a) as construed by the United States Supreme Court in *Helvering* v. *Clifford,* 309 U. S. 331." (Italics supplied.)

It was held to be immaterial whether the power to alter, amend, or revoke the trust instruments was granted to the petitioner individually or as trustee, because in neither case could the trust instruments be reasonably interpreted as giving the petitioner the right to transfer the principal and income to himself (R. 32). Since the petitioner did not possess such right, it was further held that the trust income could not be taxed to him under the rule laid down by this Court in the *Clifford* case. The Tax Court accordingly decided, as follows (R. 32):

> "Without that power, he may not, under any case cited or of which we know, be considered so completely in economic control of the trust as to be taxed upon its income. To so hold in the case of one not the settlor would be to broaden unjustifiably the concept em-

bodied in *Helvering* v. *Clifford, supra.* We conclude and hold that the Commissioner erred in including the trust income in that of the petitioner. Reviewed by the Court."

Thus the Tax Court's decision was based solely and squarely on its finding that the established facts did not bring the present case within the rule of the *Clifford* case. In reversing the Tax Court's decision, the Circuit Court must be regarded as having redetermined this question to the contrary, since it was the sole issue upon which the Tax Court's decision was based.

Although the Circuit Court's opinion did not refer specifically to the *Clifford* case, it held that the issue depended upon whether the petitioner had the right to appropriate to himself the principal or income of the trusts (R. 44), which was the fundamental issue in the *Clifford* case. Moreover, the Circuit Court cited, as the basis for this holding, *Richardson* v. *Commissioner*, 121 Fed. (2d) 1 (R. 44), which applied the *Clifford* doctrine to a situation, such as that in the instant case, in which the taxpayer was not the grantor of the trust. Therefore the Circuit Court's decision constitutes a reversal of the Tax Court's determination that the facts in the present case did not fall within the scope of the *Clifford* doctrine.

In the case at bar, the opinion of the Circuit Court contained no reference to the *Dobson* doctrine. However, the petitioner's brief discussed at length his contention that, under that doctrine as established by the decisions of this Court, the Circuit Court should not reverse the Tax Court's decision in the instant case. Moreover, this point was also urged in the oral argument on behalf of the petitioner before the Circuit Court. Since the point was duly raised and was directly at issue, the Circuit Court must be considered as having decided that

it had the right to reverse the Tax Court's decision to the effect that the facts did not justify the application of the *Clifford* rule.

The Circuit Court of Appeals, Second Circuit, had previously held that, under the *Dobson* doctrine, it was entitled to review and reverse a determination of the Tax Court that the grantor of a trust was taxable upon the trust income under the rule of the *Clifford* case. (*Cushman* v. *Commissioner*, 153 Fed. (2d) 510, decided January 14, 1946, no petition for certiorari filed.) In that case, the majority opinion contained the following conclusion:

> "Although it may be that the presence of sufficient factors to bring taxation of a trust within the doctrine of the *Clifford* case, *supra*, is to be treated as a question of fact, see *Paul, Dobson* v. *Commissioner*: The Strange Ways of Law and Fact (1944), 57 Harv. L. Rev. 753, 817 and n. 295, 833-34, 848, nevertheless, whether or not a particular characteristic in the relationship of the grantor to that trust may be treated as an element of 'control' within the *Clifford* doctrine is a problem of 'general applicability' reviewable under *Dobson* v. *Com'r.*, 320 U. S. 489."

In the *Cushman* case, Judge Frank dissented in a separate opinion, because of this Court's decisions in *Stuart* v. *Commissioner*, 317 U. S. 154; *Dobson* v. *Commissioner*, 320 U. S. 489; *Bingham's Trust* v. *Commissioner*, 325 U. S. 365; and *The John Kelley Company* v. *Commissioner*, 326 U. S. 521. The dissenting opinion contained the following statements:

> "It would seem that the Supreme Court regards a Tax Court decision of a *Clifford* question as one of 'mixed law and fact' which 'will usually afford little concrete guidance for future cases' except when, in reaching its decision, the Tax Court announces 'a rule of general applicability', as, for instance, if the Tax

> Court decided that all trusts in which the grantor has any voting power in trusteed stock came within *Clifford*. No such 'rule of general applicability' appears in the Tax Court's decision in the instant case. It is significant, I think, that when the Court, in the *Dobson* case (320 U. S. at 501), assimilating decisions of the Tax Court to those of administrative bodies, said 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body', it cited the *Clifford* case."

Thus, in the *Cushman* case, the Second Circuit decided that, under the *Dobson* rule, it was entitled to review a determination by the Tax Court as to whether a particular element of control over a trust estate rendered the taxpayer subject to tax under the rule of the *Clifford* case.

In the very recent case of *Chertoff* v. *Commissioner* (C. C. A. 6, No. 10308, decided April 7, 1947), the decision of the Sixth Circuit was directly to the contrary of the decision reached by the Second Circuit in the *Cushman* case.

The question presented in the *Chertoff* case was precisely the same, in principle, as that at issue in the case at bar, namely whether the income of certain trusts created for the primary benefit of children of the petitioners was taxable to the latter under the doctrine of the *Clifford* case. The Tax Court had upheld the contention of the Commissioner that the income was so taxable. The ruling of the Tax Court was to the effect that the control over the trust estates possessed by the petitioners was practically the same as that which an individual might exercise over his own property. It was concluded that, under such circumstances, the petitioners possessed "such a bundle of rights with respect to the trust property as to amount, for Federal tax purposes, to substantial owner-

ship thereof". Accordingly the petitioners were held taxable on the trust income under Section 22 (a) of the Internal Revenue Code.

In affirming the decision of the Tax Court, the Sixth Circuit held that, since the determination of the Tax Court had "warrant in the record and a reasonable basis in the law", it must be affirmed in accordance with the *Dobson* rule, as enunciated by this Court. The reasoning which led the Circuit Court to this conclusion was based upon thorough study of this Court's decisions concerning the *Dobson* rule. Portions of the Circuit Court's opinion are quoted below at considerable length, since the opinion expresses most clearly the problem involved and the sharp conflict between the conclusions of the Circuit Courts for the Second and Sixth Circuits:

> "The respondent relies upon the principles laid down in *Helvering* v. *Clifford, supra,* and the ruling in *Dobson* v. *Commissioner,* 320 U. S. 489, that the determinations of the Tax Court are not reviewable if its decision has warrant in the record and a reasonable basis in the law. The petitioners contend that since the facts are stipulated the finding of the Tax Court that under the trust provisions here involved the petitioners retained such a bundle of rights with respect to the trust property as to amount, for Federal tax purposes, to substantial ownership thereof within the ruling of the *Clifford* case, is not a finding of fact but a clear-cut question of law and reviewable by this Court as such. Under that theory they strongly argue to us the merits of the case. If that theory is incorrect and the case is one to which the *Dobson* rule is applicable, such argument is irrelevant, since the issue involved is not open for redetermination by us. *Choate* v. *Commissioner,* 324 U. S. 1, 3-4. *Opinions of the Supreme Court subsequent to the Dobson case strongly indicate the finality*

which should be given to decisions of the Tax Court when the question involved is one of this character. Commissioner v. *Scottish American Company,* 323 U. S. 119; *Commissioner* v. *Court Holding Company,* 324 U. S. 331; *John Kelley Company* v. *Commissioner,* 326 U. S. 521. See also *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, and concurring opinion of Mr. Justice Frankfurter at pages 377 through 384. *Those cases show that the Dobson rule is not restricted to primary findings of fact, but includes findings or rulings based upon those facts, such as whether certain existing facts bring the case within the language of the taxing statute.* As stated in *Commissioner* v. *Scottish American Company, supra,* at page 124, 'when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have any substantial basis in the evidence.'

"* * * We believe that under present authorities the determination by the Tax Court that the established facts either do or do not bring the case within the *Clifford* doctrine, is such a finding, either of fact or of mixed law and fact, that it is not reviewable in this Court except to the extent of determining if it has warrant in the record and a reasonable basis in the law. The *Clifford* case itself seems to hold that such a finding is one of fact. *Helvering* v. *Clifford, supra,* at pages 336 and 338. This Court so treated the ruling in the *Clifford* case in *Commissioner* v. *Goulder,* 123 F. 2d 686, 689, CCA 6th. * * * the rule was again applied by this Court in the later cases of *Miller* v. *Commissioner,* 147 F. 2d 189, 193 and *Byerly* v. *Commissioner,* 154 F. 2d 879, cert. denied. * * * This view also has support in other circuits. *Klein* v. *Commissioner,* 154 F. 2d 58, CCA 3rd; *Littel* v. *Commissioner,* 154 F. 2d 922, CCA 2nd; *Hash* v.

> *Commissioner,* 152 F. 2d 722, CCA 4th. Under that view of the case, we are of the opinion that considering all the provisions of the trust, * * * the determination of the Tax Court has warrant in the record and a reasonable basis in the law and must be affirmed." (Italics supplied.)

It will thus be observed that the decision of the Sixth Circuit in the *Chertoff* case is in direct conflict with the decisions of the Second Circuit in the *Cushman* case and in the instant case. Although, as previously mentioned, the opinion of the Second Circuit in the case at bar did not refer specifically to the *Clifford* case, the decision was based largely upon *Richardson* v. *Commissioner,* 121 Fed. (2d) 1, which was an interpretation of the *Clifford* rule. Furthermore, the very fact that the Second Circuit, in the instant case, reversed the decision of the Tax Court, and did so on the ground that the Tax Court was in error in determining that the petitioner's right to alter or amend the trust instruments could not be exercised for his personal benefit, demonstrates, in itself, that the Circuit Court concluded that it was entitled to review and reverse such determination of the Tax Court.

It is therefore respectfully submitted that the decisions of the Circuit Court of Appeals, Second Circuit, in the *Cushman* case and in the case at bar are in direct conflict with the decision of the Circuit Court of Appeals, Sixth Circuit, in the *Chertoff* case; and that the case at bar presents an important aspect of the administration of the Internal Revenue laws which has not been, but which should be, settled by this Court.

CONCLUSION.

For the foregoing reasons, it is submitted that the petition for a writ of certiorari to the Circuit Court of Appeals, Second Circuit, should be granted by this Court.

Respectfully,

LEONARD G. BISCO,
Counsel for Petitioner,
29 Broadway,
New York 6, N. Y.

FREDERICK E. WINKLER,
BRUCE MCCLAIN,
Of Counsel.

APPENDIX.

Statutes Involved.

Internal Revenue Code:

"SEC. 22. GROSS INCOME.

(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

Real Property Law

(McKinney's Consolidated Laws of New York Annotated, 1945 Edition, Vol. 49, Part 1.)

"§131. Definition of a power

A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform.

"§134. General power

A power is general, where it authorizes the transfer or incumbrance of a fee, by either a conveyance or a will of, or a charge on, the property embraced in the power, to any grantee whatever.

"§135. Special power

A power is special where either:

1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or,

2. The power authorizes the transfer or incumbrance, by a conveyance, will or charge, of any estate less than a fee.

"§136. Beneficial power

A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void.

"§137. General power in trust

A general power is in trust, where any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.

"§138. Special power in trust

A special power is in trust, where either,

1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or,

2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power."